New York Electrical Contractors Association, Inc. *and* William Bryant. Case 2–CA–22415

April 12, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On August 7, 1990, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief. The Joint Industry Board of the Electrical Industry filed an amicus curiae brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Since we agree with the other grounds on which the judge based his recommended dismissal of the complaint, we find it unnecessary to pass on the issue of whether the Joint Industry Board was an agent of the Respondent.

Larry Singer, Esq., for the General Counsel.
Edward T. Byrne. Esq. (Murtagh, Cohen Byrne, Esq.), of Garden City, New York, for the Respondent.
Daniel E. Clifton, Esq. (Clifton & Schwartz, Esq.), of New York, New York, for the Charging Party.
Vito Mundo, Esq. (Menagh & Trainor, PC), of New York, New York, for Joint Industry Board.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Pursuant to a charge filed by William Bryant, an individual (Bryant) on September 3, 1987, a complaint was issued against New York Electrical Contractors Association, Inc. (Respondent or NYECA) on December 31, 1987.

The complaint, as amended at the hearing, alleges that Bryant applied for employment on about May 1, and November 28, 1987, with NYECA through its agent, the Joint Industry Board (JIB), and that NYECA through JIB, failed and refused to consider him for referral for employment because Bryant (a) had previously filed charges with the Board against Local 3, International Brotherhood of Electrical Workers, AFL–CIO (the Union or Local 3) ''and/or Respondent NYECA or its agent JIB,'' or because Bryant (b) is not a member of the Union, or any other labor organization.

The complaint further alleges that since about 1971:

(a) NYECA and the Union have unlawfully maintained a practice covering applicants for employment among NYECA constituent members requiring, in pertinent part, that JIB of the Electrical Industry's employment department be the sole and exclusive source of referrals to employment with NYECA's constituent members.

(b) The employment department of JIB of the Electrical Industry has failed and refused, and continues to fail and refuse, to register for referral and refer to employment with NYECA's constituent members employees who are not members of the Union, or any other labor organization.

Respondent's answer denied the material allegations of the complaint. Its amended answer asserted the affirmative defense that Bryant failed to exhaust the exclusive grievance procedure set forth in the employment plan of the Electrical Industry.

A hearing was held before me in New York City on May 1 and 2 and July 19, 1989.

Based on the entire record in this proceeding, including my observation of the demeanor of the witnesses and after considering the briefs filed by NYECA and JIB, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, NYECA, is a trade association—the New York Chapter of the National Electrical Contractors Association. NYECA consists of about 90 electrical contracting companies which employ electricians who work in the New York City area. NYECA itself employs no electricians. It employs an executive director and two clerical assistants. It has been in existence since 1934. Pursuant to its constitution and bylaws, NYECA has the authority to negotiate collective-bargaining agreements on behalf of its members.

Respondent's answer admits that annually, the various employer-members of NYECA, in the course and conduct of their business operations, collectively derive income in excess of $50,000 from services provided to various enterprises located outside New York State, and purchase and receive at their New York City facilities goods and supplies valued in excess of $5,000 from sources located outside New York State. Respondent admits that its employer-members are engaged in commerce within the meaning of Section 2(6) and (7) of the Act. I accordingly find that the Board has jurisdiction over Respondent. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES, ORGANIZATION, AND BACKGROUND

An electrical contractor employer in the New York City area may be a member of NYECA or the Association of Electrical Contractors (AEC) or may be unaffiliated. NYECA represents about 90 contractors; AEC has about 140 members, and there are about 50 to 60 unaffiliated contractors.

The Union has one collective-bargaining agreement with the two associations. Although not named as a party to that agreement, the unaffiliated contractors are also parties to the

contract. The most recent agreement was effective from June 13, 1986, and ran for 3 years.

The collective-bargaining agreement provides for the establishment of a Joint Industry Board (JIB). The Joint Industry Board consists of a total of 31 persons: 15 representing the Union, 15 representing the Employers, and 1 person representing the public. With respect to the 15 employer-members, Respondent NYECA elects 10 of the members; the AEC elects 4, and the independent contractors elect 1. Accordingly, Respondent elects 10 of the 31 members of JIB. The cost of the administration of JIB is paid for by the ''Employers of the Industry.'' According to the rules and regulations of JIB, decisions of that body require the ''affirmative vote of 75% of the total number of elected representatives.''

One of the functions of JIB is the administration of the employment plan of the Electrical Industry. The employment plan is administered by the employment department of JIB. The employment plan states as follows:

> In furtherance of the public interest in equitable distribution of work, every request for the assignment of construction electricians or apprentices by any Employer shall be referred to the Employment Department of JIB for assignment to work within the terms of and as part of the Employment Plan herein established . . . .

Robert McCormick is the director of the employment department. He stated that he is responsible for receiving requests for employees from the contractors and requests from employees that they be sent to work, and sending workers out to those jobs.

The employment plan also provides for an employment committee which reviews the work of the employment department, and which also has the power to investigate and take ''proper action'' on complaints by electricians. The employment committee currently consists of four employer members, two of whom are affiliated with NYECA, and two with AEC. There is an equal number of union members, and two ex officio members: the chairman of JIB and the director of employment.

III. THE FACTS

A. *The Refusal to Refer William Bryant*

1. Bryant's work record

Robert McCormick, the director of the employment department of JIB explained the procedure for referral of employees as follows: He receives a call from a contractor requesting that employees be referred. The contractor will specify the number needed, skills required, and the duration of the job. Employees come to his office to be referred to work.

The employee will bring his layoff slip from his last job and state that he is available for work. McCormick reviews the layoff slip. If it states that the worker was laid off for lack of work, McCormick considers that a ''good'' layoff slip, and will refer the person to work. If the slip indicates that the employee could not get along with his coworkers, he asks the employee what happened, contacts the employer to get its version of the incident, and then he decides whether to refer the individual. When making this decision McCormick does not consult with anyone at the Union.

McCormick further stated that he conducts the business of the employment department, and follows the policies of the employment committee, which is to refer workers who are responsible, qualified and productive. He added that JIB may review and override his decisions, but has never done so. He makes decisions on referrals without input from anyone from NYECA, JIB, or the Union. However, as set forth below, the Union may make a recommendation that McCormick refer a worker who has grieved the employment department's failure to refer him. He added that NYECA has no control over his activities, and no influence over whether Bryant or anyone else is referred to employment.

McCormick further stated that if an employee is not referred, he may file a grievance with the Union. The Union's executive board will review the employee's work record and if it believes the grievance has merit will recommend that McCormick refer the employee to work. McCormick may accept or reject that recommendation. If the Union does not agree with McCormick's decision, it may appeal to JIB. He does not recall whether that situation ever occurred.

Solomon Tanner, the president of NYECA and its representative at JIB, stated that he either attended or read the minutes of every JIB meeting for the past 7 to 8 years, and never saw or heard Bryant's name mentioned, or any discussion of his work record.

William Bryant has been a member of the Union since September 1977. He resigned his membership in the Union in 1983.

Bryant stated that he was referred to employment by the employment department of JIB. When he received a layoff slip he took it to the employment department. When the layoff slip indicated a ''good'' reason for the layoff such as lack of work—he would be referred to another job.

Bryant has had a series of violent incidents at work through 1982 involving coworkers and supervisors. It was those events that disqualified him from future referrals to jobs, according to Respondent. The General Counsel does not claim that Respondent's initial decision in November 1982 not to refer him after these incidents was unlawful. Rather, the General Counsel asserts that he was not referred in 1987 because of charges he filed against the Union and the Respondent, and because he was not a member of the Union.

Because these incidents are asserted by Respondent as the reason for its continued refusal to refer Bryant, it is necessary to recite their details.

a. *Hugh O'Kane Electric*

Bryant was employed by this company in January 1981. He testified that while on the job, one worker, Bezpalko, tried to close a truck door on Bryant's head. Bryant asked if he was crazy and the worker replied that he would get him. Bryant then hit him in the face. The next day, Bezpalko and two others grabbed him. Bezpalko drew a gun and Bryant pulled a knife. The three men ran down the street away from Bryant who chased them. Then O'Kane, the employer, told Bryant that if O'Kane was one of the three men he would have shot Bryant. O'Kane walked toward Bryant, who picked up a bottle. Bryant did not want O'Kane to come any closer so he threw it at O'Kane, but missed. However, the bottle hit O'Kane's car, breaking a window.

b. *Herbert Schlesigner Electric*

Bryant testified that in March 1981 he was working on a ladder in a hallway of a construction site. He stated that rocks were thrown down on him from the upper floors, and that one worker while walking through the hallway swung open the door, pushing Bryant's ladder. Bryant stated that the man did that eight times. Bryant asked him several times to knock before opening the door. He also stated that one worker said, ''Let's get him now.'' However, Bryant stated that he did not believe that they were referring to him. At the end of the day, Bryant asked his coworkers to advise him if they had a ''routine'' going, so he could observe it. Bryant testified that the worker who said, ''Let's get him now,'' lunged at him as if to hit him. Bryant then hit him. His written report of the incident is as follows: ''It started after work . . . . Three of them was together. So we had words and one of them was hit and that was it.'' The next day, Bryant saw one worker punching his palm, and then seven to eight workers chased him down the street and beat him. Bryant was taken to the hospital.

Paul Perciballi, an employee of Schlesinger Electric, testified that Bryant banged into walls with a hammer for no apparent reason and was avoided by him and the other workers because of his strange behavior. Perciballi stated that as he left work with two other employees, Bryant said to him: ''Wait a minute. We got to get something straight.'' Bryant then punched him in the face, breaking his nose. He was taken to the hospital. Perciballi denied pushing Bryant's ladder or saying ''let's get him now'' or provoking him in any way. Perciballi is 5 feet 3 inches tall and weighs 130 pounds. Bryant is about 6 feet tall, and weighs about 230 pounds. Coworker George Montedoca corroborated Perciballi's version of this incident.

The Schlesinger's termination report states the reason for the termination as ''physical assault to [a Schlesinger] employee.''

c. *Other employers and Bryant's meeting with the Union*

Up to this point, Bryant had received termination reports from other employers for such conduct as ''unproductive, not suitable, uncooperative.''

Following his termination by Apelco Company for ''uncooperativeness,'' on December 7, 1981, Walter Ineson, the Union's business representative, wrote a memo concerning a meeting he had with Bryant. The memo stated that Ineson told Bryant that he worked for 19 contractors ''and in many instances received bad terminations.'' The memo further stated that Ineson's suggestion that Bryant be seen by the medical department for a personality evaluation was rejected by Bryant. The memo further stated that he ''informed [Bryant] that the time is close at hand when we will not have an employer that will be willing to hire him.'' It concluded by stating that Bryant was ''cleared'' for employment.

d. *Pomalee Electric Co.*

Bryant was employed by this company in January 1982. The company alleged that Bryant threatened the employer's foreman and family. Bryant denied doing so. The termination report states ''uncooperative'' as the reason for termination.

e. *H & D Electric Co., Inc.*

Bryant was employed by this company in July 1982. He stated that he was talking to his coworkers when they pushed and shoved him to the back of a hallway. He tried to walk away but they continued to push him. He pulled out a hatchet and they moved away.

The company's termination report listed ''unreliable'' as the reason for termination. However, a letter written by the employer to the Union states that ''we had to terminate the employment of William Bryant due to problems caused by him on the job. On a number of occasions, he physically threatened his co-workers and caused a great deal of commotion on the job. He was also unreliable and not consistent in his working habits.''

Bryant stated that following his termination from this job, he was told by McCormick and Walter Ineson, the Union's business representative, that they are happy to refer him to work because they have no problems with his work.

f. *Jo-Mel Electric Corp.*

Bryant was employed by Jo-Mel in October 1982. He stated that an employee smacked him in the back, causing him to nearly break a window with a pipe he was carrying. Bryant yelled at him, asking him why he hit him. They spoke for a while, the employee was laughing. Bryant told him that he did not think that it was funny. The construction superintendent then told Bryant to ''shut up.'' Bryant asked if he saw what the man had done.

The employer sent a letter to JIB, which stated that Bryant used ''foul'' language and was told by the construction superintendent to be less verbally abusive. Bryant replied: ''Shut up or I'll knock you on your ass.'' The letter further stated that Bryant told employee Storniello without cause that he would be ''struck.'' The letter also mentioned that Bryant ''repeatedly threatened other workers on the job'' as a result of which the superintendent insisted on having him removed from the jobsite.

Bryant denied the statements attributed to him by Jo-Mel.

The termination report stated that Bryant was terminated due to ''reduction in work force.'' Bryant testified that when he took that slip to JIB he was told by McCormick that Jo-Nel called and changed the termination slip because it did not want anyone yelling on the job. He further stated that McCormick then told him that he would not be referred because he was involved with too much violence on the jobs. According to Bryant, McCormick also told him that he had to see the ''executive board'' and obtain clearance before he would refer him to other employment.

g. *Incidents at the JIB building*

On various occasions, Bryant created disturbances in JIB building, yelling and cursing, breaking a wall-mounted ashtray, slamming doors, and entering the building with a stick. Regarding the stick, Bryant testified that he found a scrap piece of wood in a lumber yard in Manhattan, which was 2 feet long. He intended to use it as a support, perhaps for a leg of a table. He brought it to JIB building in Queens. The police were called, and they told him to drop the wood and would not permit him to stay in the building. On other occasions Bryant was either escorted out of the building by security personnel or by the police.

h. *The decision not to refer Bryant*

Bryant was last referred to employment by JIB on November 8, 1982. Robert McCormick, JIB director of employment, testified that shortly after that date he made the decision not to refer Bryant to further work through the employment department. Although the letters documenting these incidents were dated in December 1982, after the decision was made and were sent to the Union and not JIB, McCormick stated that he was orally told about many of the difficulties, set forth above, by Bryant's employers when they occurred, before the decision not to refer was made. In addition, the letter from Jo-Mel was dated November 10, 1982, at about the time of the refusal to refer, and was sent to JIB. McCormick called the Jo-Mel incident the ''last straw'' which caused him to decide not to refer Bryant thereafter. McCormick termed this a ''highly unusual case'' because of the ''high level of violence'' engaged in by Bryant. He stated that the decision not to refer Bryant was based on his ''record of violence against other employees of the contractors,'' and not because he filed any charges with the board. In fact, McCormick stated that he was not aware that Bryant filed any charges against JIB or the Union.

McCormick testified that he would not reconsider his decision not to refer Bryant, and that he would not refer him again because of the level of violence that he engaged in on the jobs.

On December 13, 1982, Bryant appeared before the union executive board and requested its help in ''having him placed on the employment rolls'' of JIB.

The executive board discussed his employment record with him. Bryant explained that he did not instigate any fight. The executive board told him that ''in order for [it] to make an appeal to the Employment Department of JIB on his behalf, he would have to furnish adequate and irrefutable information as to his reliability and his ability to hold a job. It was suggested that he seek employment . . . and . . . . save all pay stubs for . . . six months and . . . once more appear before the Executive Board for a review of the matter.''

Bryant's employment record states that in July 1983 he left the industry, and that he resigned from the Union.

2. The charges filed by Bryant

The complaint alleges that Bryant was refused consideration for referral for employment because he filed charges against the Union ''and/or Respondent NYECA or its agent JIB, and/or because Bryant is not a member of the Union or any other labor organization.''

The record contains seven charges filed by Bryant against the Union, from September 1983 through July 1987. The record is devoid of any evidence that any charges were filed against NYECA or JIB, aside from the one before me.

All the charges allege the Union's failure or refusal to refer Bryant to employment. Three charges were withdrawn, and two were dismissed. One dismissal letter, in Case 2–CB–10039, stated that the Union based its decision not to refer him after reviewing his prior work record and determining that he was unable to work alongside other employees, but that the Union would resume referring him if he would enter a counseling program, or demonstrate his ability to work with other employees by obtaining and holding a job on his own.

The other dismissal letter, in Case 2–CB–11196, stated that on September 30, 1985, a business representative of the Union and/or JIB referred him to employment at the Veterans Administration Hospital, where he was interviewed by the employer. With respect to that, Bryant testified that he was referred to that job by Union Business Representative Ineson, but did not get the job.

In a letter of September 1984 to a Board agent, in response to a charge filed by Bryant against the Union, Union Attorney Norman Rothfeld wrote that ''any possible obligation of the union to try to induce JIB to refer Mr. Bryant for employment ceased when he resigned from the union.''

a. *Bryant's communications with the Union and the Respondent*

In January and September 1985, in an attempt to comply with the suggestion stated in the dismissal letter in Case 2–CB–10039, Bryant sent the Union a list of five electrical contractors he worked for in 1983 and 1984. He obtained these jobs without the assistance of JIB employment department. He stated that, after his first job, he told Ineson that he obtained other work but Ineson told him that he still had to see the Union's executive board. Bryant further stated that he tried to see the executive board but was unable to do so.

In March 1986, Bryant wrote to the International union, requesting that Local 3 continue to refer him to employment. In November 1986, he made the same request to the Union.

In February 1987, Bryant again wrote to the Union and in May 1987, to JIB requesting referral to jobs. He enclosed a list of the employers he had been working for since he was last refused referral. The Union's reply in March 1987, stated that inasmuch as Bryant resigned from the Union in 1983, ''it is now not possible to be reinstated into [the Union].''

In May 1987, Bryant wrote to the Union, requesting information regarding renewing his membership in the Union. Bryant stated that he repeatedly attempted to get an appointment to meet with the Union's executive board but he was not able to.

b. *Issues of condonation and disparate treatment*

In March 1981, after Bryant allegedly assaulted another worker, McCormick continued to refer him to employment. McCormick testified that he accepted Bryant's explanation of the incident and decided to give him another chance.

Employee D. Westray threatened his foreman in September 1987. McCormick told him that he was no longer employable because of that incident. McCormick gave him an opportunity to ''rehabilitate'' himself, by telling him that he would only refer him if he proved that he could on his own obtain and hold other jobs. Thereafter, Westray obtained other jobs without being referred, and thereafter when that proof was received, he was referred by the employment department. McCormick testified that such a procedure is commonly used with ''problem people.'' However, he added that he did not tell Bryant that he should prove he could hold other jobs because Bryant's situation was different, because it involved violence. Westray only threatened someone—he did not engage in a physical altercation as Bryant did.

McCormick also testified that he has referred workers who have been arrested and have served time in jail. He does not know what their crimes were.

B. *The Exclusive Hiring Hall Allegations*

The complaint alleges that since about 1971, NYECA and the Union have unlawfully maintained a practice covering applicants for employment among NYECA's members, requiring that JIB be the sole and exclusive source of referrals to employment with NYECA's members. The complaint further alleges that since 1971, JIB has failed and refused to refer to employment with NYECA's members, employees who are not members of the Union, or any other labor organization. The complaint states that those actions which occurred within the 10(b) period, violate Section 8(a)(1) and (3) of the Act.

The employment plan, which is administered by the employment department of JIB states as follows:

> The facilities of the Employment Plan shall be made available to both members and non-members of the Union alike and in the administration of said Employment Plan qualified journeymen electricians shall be referred to employers without discrimination as to whether or not such qualified journeymen electricians are or are not members of the Union.

The employment plan also provides:

> In furtherance of the public interest in equitable distribution of work, every request for the assignment of construction electricians or apprentices by any employer shall be referred to the Employment Department of the JIB for assignment to work within the terms of and as part of the Employment Plan . . . .

There is no requirement in the collective-bargaining agreement or in the employment plan that employers must obtain all of their employees from the employment department of JIB, or that such employers use JIB referral procedures exclusively. Employers may hire any employees they wish to perform electrical work. However, Solomon Tanner, an employer who is also president of NYECA, testified that he ''rarely'' hires an employee ''off the street.'' In practice, employers obtain needed employees from the employment department because they know that the workers referred will be ''qualified.''

In support of these allegations of the complaint, the General Counsel relies on Union Attorney Rothfeld's letter, discussed above, in which he stated that the Union had no obligation to seek to induce JIB to refer Bryant because he was no longer a member of the Union. Rothfeld testified that the letter was his legal opinion, not the Union's policy. He stated that the Union has tried to induce JIB to refer to work nonmembers of the Union with occasional success. It should be noted that that letter was sent to the Board agent in 1984, after which six charges were filed against the Union, none of which resulting in a complaint.

The General Counsel also relies on the testimony of JIB Director of Employment McCormick. McCormick testified that under the referral system used now, a person having a union card is referred to work with no inquiry into his qualifications. He assumes that the person who is a union member is qualified. As set forth above, only ''qualified journeyman'' may be referred to employment.

However, McCormick also stated that if a nonmember of the Union requests referral to employment, he gives him an application for employment. The application asks for information concerning prior employment. A questionnaire is sent by McCormick to the listed employers, and the results of the responses are reviewed to see whether the applicant is qualified. If the applicant is qualified, he is referred out for employment. McCormick added that quite recently about seven people came to his office, said they were not members of the Union, and requested referral to employment. They were given applications. Prior to that time, from 1971, no one who was not a union member sought referral to employment. Rather, McCormick received inquiries concerning how to become a union member, or how to join the apprenticeship program, but did not, until recently, receive a request by a nonmember of the Union for referral to work. He further stated that he never referred anyone who was not a member of the Union or another IBEW local. However, he did refer members of Local 363, International Brotherhood of Teamsters, but they had been qualified by examiners of the Union.

Analysis and Discussion

The General Counsel concedes that the refusal to refer Bryant in 1982 may not have been unlawful due to his work record up until that time. However, what is claimed as unlawful is an alleged scheme engaged in thereafter by JIB and the Union to deprive Bryant and other nonmembers of the Union of work.

It is also alleged that the referral practices of JIB constitute an exclusive hiring hall which has been unlawfully maintained by Respondent and the Union. It must be observed that no charge alleging any unlawful activity with regard to this proceeding has been filed against the Union. Nor has a copy of the charge or the complaint in this case been served on the Union.

The General Counsel's theory is that JIB, as the agent of NYECA, acted at the behest of the Union in refusing to continue to refer Bryant to employment once he resigned from the Union in about July 1983. The General Counsel asserts that the reason that JIB refused to refer Bryant was because Bryant was not a member of the Union and, or filed charges against Respondent and the Union.

In December 1982 Bryant was told by the Union that he should obtain other jobs on his own and then return to the Union's executive board. He began work at other jobs in September 1983, after resigning from the Union. He presented evidence that he worked at other jobs, which was apparently ignored by the Union. The General Counsel argues that the Respondent refused to refer him, and the Union refused to help him even after presenting evidence of satisfactory work at other jobs, because he was not a union member, and because he filed charges against the Union and Respondent. As set forth above, there is no evidence that any charge has been filed against the Respondent prior to this proceeding.

The General Counsel asks me to conclude from the fact that no nonmembers of the Union have been referred to employment that (a) Respondent sought to discriminate against Bryant because he is not a member of the Union, and (b) that the Union controlled Respondent's employment department by ordering it not to refer Bryant because he is not a member of the Union, and because he filed charges against

it. No evidence has been adduced to support such conclusions.

The only evidence which may be credited is that McCormick, as the employment director, made a decision in November 1982, that he would not refer Bryant to employment thereafter because of his record of violence on jobs to which he had been referred. McCormick credibly testified that he made this decision without consulting anyone, including the Union.

Bryant conceded that McCormick told him in November 1982, that he would not refer him due to the violence he was involved with. However, the General Counsel relies heavily upon McCormick's alleged remark to Bryant at that time that Bryant had to obtain ''clearance'' from the Union before he would be referred.[1] Even assuming that McCormick made that comment, it is clear that it was a reference to Bryant filing a grievance with the Union, and the Union then making a request to McCormick that Bryant be referred. The minutes of the Union's executive board meeting supports this view. The minutes recite that Bryant was told that he should obtain other jobs and return to the Board which would then consider an appeal to the employment department to have him referred to employment. This clearly means that the Union did not direct McCormick not to refer Bryant to employment. McCormick's decision in 1982 was consistent with the facts known to him at that time concerning Bryant's work record. McCormick did not change his decision since then and no evidence exists that he was influenced by the Union or other factors in continuing to refuse to refer him. McCormick credibly testified that he was unaware of any charges against the Union, and certainly was not aware of any charges against Respondent, because none had been filed. In addition, McCormick was bound to follow the policy of the employment department, which is that referrals to employment are available to members and nonmembers of the Union.

I do not find that McCormick condoned Bryant's violent acts by continuing to refer him after he was involved in certain altercations. McCormick credibly testified that he accepted Bryant's explanation of the incident with the employee involved and decided to give him another chance. McCormick cannot be faulted for this. It was only after Bryant continued to be involved in violent activities did he finally make the decision not to refer Bryant thereafter.

In addition, the situation involving employee Westray cannot be compared with Bryant's. Westray threatened, but was not involved in a physical confrontation with another worker. Bryant, on the other hand, was involved several times with violent, physical confrontations with other employees. Accordingly, McCormick was correct in giving Westray an opportunity to ''rehabilitate'' himself by finding other jobs. McCormick properly distinguished the two types of incidents, and did not give Bryant that opportunity because of the violent nature of the prior incidents.

It appears that the General Counsel's real dispute is with the Union. The Union has not apparently interceded with JIB for Bryant because, according to the General Counsel, he is not a member of the Union, and has filed charges against it. However, no charge before me has been filed against the Union, and the complaint does not name it as a respondent. The seven prior charges against the Union, all of which involve essentially the same issue as here argued by the General Counsel, the failure of the Union to assist in obtaining referrals for Bryant, were all either dismissed or withdrawn at a time when all of the facts adduced in this case were known or should have been known.

The General Counsel alleges that JIB acted as the agent of Respondent in refusing to consider Bryant for referral. The General Counsel relies on the language in JIB's rules and regulations that (JIB) is ''delegated by the parties to the collective bargaining agreements . . . to act as agent in the collection of funds required to be paid under the plans in the collective bargaining agreement.'' The General Counsel also relies on NYECA's constitution and bylaws, which states that ''each member agrees that [NYECA] has full authority . . . to negotiate a collective labor agreement on behalf of the members of [NYECA].'' and the language in the collective-bargaining agreement that JIB ''shall administer the Employment Plan of the Electrical Industry.''

Respondent denies that JIB is an agent of NYECA, and none of the language set forth above establishes that it is. In *General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 375 (1982), in finding that a union practiced racial discrimination in the operation of its hiring hall, the Supreme Court found no evidence of an agency relationship between the employer association and the joint apprenticeship training program (JATC), which was also alleged to have been discriminatorily operated. The Court stated at 394–395:

> Respondents also suggest that petitioners can be held vicariously liable for the discriminatory conduct of the JATC. They argue that the JATC is properly viewed as an agent of both Local 542 and the associations, emphasizing that half of the trustees charged with administering the JATC are appointed by the associations and that the JATC is wholly funded by mandatory contributions from the employers.
>
> The facts emphasized by respondents, standing alone, are inadequate. That the employers fund the activities of the JATC does not render the JATC the employers' servant or agent any more than an independent contractor is rendered an agent simply because he is compensated by the principal for his services. The employers must also enjoy a right to control the activities of the JATC, and there is no record basis for believing that to be the case. Neither is a right of control inferable merely from the power of the associations to appoint half of the JATC's trustees.

General Contractors and the instant case are similar in that the association itself in both cases did not hire the employees involved, and the employer members of the association fund the activities of the entity at issue. In addition, it is clear that the trustees appointed by NYECA cannot, by their numbers, control JIB. JIB is comprised of 31 trustees, only 10 of which are appointed by NYECA. Moreover, JIB's rules require an affirmative vote of 75 percent of all 31 trustees to take a certain action. Furthermore, the trustees ap-

[1] Bryant's credibility is questionable. He testified on direct examination that he never hit anyone on any jobsite and never threatened anyone with bodily harm. On cross-examination, however, he testified as to several violent confrontations with coworkers. In addition, with regard to the stick he brought to the JIB office, he alternately testified that it was a table leg he was repainting, then a support for something, then a piece of scrap he picked up in a lumber yard.

pointed by NYECA constitute two of the four trustees of the employment committee, and cannot, by their numbers, control the actions of the employment committee.

Accordingly, I cannot find that, with respect to the complaint allegations here, that JIB is the agent of NYECA.

I also reject the General Counsel's argument that NYECA and the Union have maintained a practice requiring that JIB be the sole and exclusive source of referrals to employment with NYECA's constituent members. There is no such language in the collective-bargaining agreement. The General Counsel argues, instead, that a ''practice'' has been maintained whereby JIB has unlawfully failed and refused to register for referral and refer to employment with NYECA's members, employees who are not members of the Union, or any other labor organization. He asks that I draw an inference from the fact that no nonmembers have been referred for employment since at least 1971, that JIB has discriminatorily refused to refer applicants because of their nonmembership in the Union.

At the outset, it must be noted that the Union has had no notice that its alleged practice has been alleged as unlawful, and that a remedy is sought concerning it. In addition, no evidence has been adduced that any nonmember of the Union sought referral by JIB, or that any nonmember of the Union has been unlawfully denied referral. McCormick testified without contradiction that no nonmember has sought referral to employment. Rather nonmembers sought information concerning membership in the Union, or the apprenticeship program. Bryant is the only person who it may be argued was denied referral by JIB. However, I have found that Respondent lawfully refused to refer Bryant because of his previous record of violence at work.

I accordingly find and conclude that the General Counsel has not made a prima facie showing that Bryant's lack of union membership or that he has filed charges against the Union and Respondent, as alleged in the complaint, were motivating factors in Respondent's refusal to refer him to employment. *Wright Line*, 251 NLRB 1080 (1980). Nor has the General Counsel proven that Respondent and the Union have maintained an unlawful practice pursuant to which JIB has failed and refused to register for referral and refer to employment with NYECA's members, employees who are not members of the Union, or any other labor organization.

CONCLUSIONS OF LAW

1. The Respondent, New York Electrical Contractors Association, Inc., is an employer association, whose employer-members are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 3, International Brotherhood of Electrical Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Joint Industry Board is not an agent of Respondent as alleged in the complaint.

4. Respondent has not failed and refused to consider William Bryant for referral for employment because he filed charges against the Union and/or Respondent or the Joint Industry Board, or because he is not a member of the Union, or any other labor organization, as alleged in the complaint.

5. Respondent has not maintained a practice with the Union that the Joint Industry Board be the sole and exclusive source of referrals to employment with NYECA's constituent members, as alleged in the complaint.

6. Respondent, through the Joint Industry Board, has not failed and refused, or continue to fail and refuse to register for referral and refer to employment with NYECA's constituent members, employees who are not members of the Union, or any other labor organization, as alleged in the complaint.

7. Respondent has not engaged in the violations of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The complaint is dismissed in its entirety.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.